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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 665

ALEX SCHOLDER, Individually and on behalf of others similarly situated; PALA BAND OF MISSION INDIANS and RINCON BAND OF MISSION INDIANS, individually and on behalf of others similarly situated,

Petitioners,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; STEWART L. UDALL, Secretary of the Interior; ROBERT L. BENNETT, Commissioner, Bureau of Indian Affairs; WILLIAM E. FINALE, Director, Sacramento Office, Bureau of Indian Affairs; and JESS T. TOWN, Field Representative, Riverside, California Area Field Office, Bureau of Indian Affairs,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The petitioners, Alex Scholder, the Pala Band of Mission Indians and the Rincon Band of Mission Indians, individually and on behalf of others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 22, 1970. The opinion of the United States District Court for the Southern District of California is reported at 298 F.Supp. 1282. Both opinions appear in the Appendix hereto.

JURISDICTION

The Ninth Circuit Court of Appeals rendered its judgment on June 22, 1970. Petitioners' request for a rehearing was denied on July 21, 1970. The mandate of that court has been stayed until September 8, 1970, pending the filing of this petition. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the Administrative Procedure Act include a limited waiver of federal sovereign immunity?

2. Did Bureau of Indian Affairs officials abuse their discretion by expending the BIA's irrigation appropriations for the sole benefit of a non-Indian after refusing to make any expenditures for Indians in the same irrigation system?

3. Does 25 U.S.C. §13--the applicable authorization law--limit the Bureau of Indian Affairs' authority to expend the BIA's irrigation appropriations for the sole benefit of a non-Indian purchaser of land within an Indian irrigation system?

STATUTORY PROVISIONS INVOLVED

25 U.S.C. §13, 42 Stat 208:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> . . .
>
> For extension, improvement, operation and maintenance of existing Indian irrigation systems and for development of water supplies.
>
> . . .
>
> (Emphasis added).

Other statutes involved are set out in the Appendix hereto.

STATEMENT OF THE CASE

The Indian petitioners, Alex Scholder and the Rincon and Pala Bands of Mission Indians, brought this suit individually and on behalf of other Indians similarly situated. They challenged the Bureau of Indian Affairs' authori to build an irrigation lateral solely for a non-Indian on non-Indian land with an appropriation for Indian irrigation systems within the Pala Indian Irrigation Project and then charge a portion of the construction cost to Indian lands in the project.

Over 45 percent of the Indian acreage within the Pala project is without functioning laterals. The area is naturally very arid. In

past years Indian landowners, as well as representatives of the Pala Band, have made numerous requests to the Bureau for the construction and repair of laterals, and the Bureau's uniform response was that no moneys were available. The former owners of the non-Indian property were Pala Indians, and they were forced to give up the allotment after their fruit trees died for lack of water. Their requests to the Bureau for repair of the lateral were refused, and the land was completely without water. Yet shortly after Willard Allers, a non-Indian, purchased the property, the Bureau began to build a lateral that would benefit solely his land.* At the time the briefs for this appeal were filed, the Bureau had approved no other laterals in the Pala project.

In these circumstances, petitioners challenged the expenditure for Allers' lateral as arbitrary and capricious, an abuse of discretion, an unconstitutional taking, a conversion, a breach of a fiduciary duty, and an expenditure unauthorized by Congress. They sought review in the District Court in accord with the standards of the Administrative Procedure Act, 5 U.S.C. §§701-706, claiming the District Court had jurisdiction by virtue of 25 U.S.C. §345 and 28 U.S.C. §§1353, 1361 and 1362. Petitioner Scholder is an Indian holder of a trust allotment within the Pala project.

---

*Whether the BIA agreed to build this lateral as an inducement to Allers to get him to purchase the land or only after he had done so is a disputed question of fact.

The District Court held that it lacked jurisdiction over Scholder's class action and dismissed the action as to Indian allottees in the project. It granted summary judgment against the remaining petitioners. The Court of Appeals reversed and remanded the dismissal of a portion of Scholder's claims, relating to the validity of the construction cost to be charged against the Indian lands in the project. The Ninth Circuit affirmed the grant of summary judgment denying petitioners' primary claim relating to the validity of the challenged expenditure by holding that sovereign immunity barred judicial review.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT ON THE ISSUE OF JUDICIAL REVIEW OF AGENCY ACTION.

The decision of the court below followed its own recent dicta in Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969) that the Administrative Procedure Act does not constitute a limited waiver of sovereign immunity and held that agency action is not reviewable under the Administrative Procedure Act unless the officer's actions are outside the scope of his statutory or constitutional authority. Tooahnippah v. Hickel, 397 U.S. 598 (1970) is directly to the contrary.

In Tooahnippah, the plaintiffs brought an action against the Secretary of the Interior contending that the action of his agent, the Regional Solicitor, disapproving an Indian will, was arbitrary, capricious and an abuse of discretion and that it exceeded his authority under 25 U.S.C. §373. Section 373 specifically

grants the Secretary the authority to approve or disapprove the will. In holding that the Secretary's decision was reviewable under the Administrative Procedure Act and that his disapproval of the will was arbitrary and capricious, the Supreme Court specifically inquired into the limitations on the extent of the Secretary's discretionary authority in light of the specific circumstances presented in the case. If sovereign immunity was considered a bar to suit, the merits of this issue would never have been reached by the Supreme Court.

By contrast, the court below held that sovereign immunity shielded the agency's action from precisely this kind of judicial scrutiny --review of the limits of agency discretion on the merits. Had the merits been reached, there is no question that the agency action would have been found to be an abuse of discretion because Part III of the Ninth Circuit's opinion characterized the action as "bordering on the shocking" and "reflecting, at best, gross insensitivity". In view of this direct conflict with the Supreme Court on the reviewability of agency action under the Administrative Procedure Act, the case at bar is an apt candidate for summary reversal.*

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*Terminological problems seem to abound in the entire area of judicial review of agency action. With respect to the issue of sovereign immunity, there is a question as to whether a federal official who has abused his discretion, or has acted arbitrarily or capriciously must necessarily have acted either unconstitutionally or beyond the scope of his statutory authority. If an agency action that is arbitrary or capricious or an abuse of discretion

is necessarily ultra vires or unconstitutional, the issue as to whether or not the Administrative Procedure Act constitutes a limited waiver of sovereign immunity largely disappears, because all actions brought under that Act would fall within these traditional exceptions to the application of the doctrine of sovereign immunity as set out in Dugan v. Rank, 372 U. S. 609 (1963). Terminological problems aside, the critical point in the sovereign immunity thicket is exemplified by the contrasting approaches and holdings of the Supreme Court in Tooahnippah and the Ninth Circuit in the case below. In Scholder, one of the relevant statutes, 25 U.S.C. §13, was examined and interpreted in isolation without reference to the undisputed circumstances underlying the challenged agency action. Once the conclusion was reached (which petitioners challenge) that the defendants were authorized under 25 U.S.C. §13 to expend funds to build a lateral for the benefit of a non-Indian, the factual background set forth in Part III of the Ninth Circuit's opinion was brushed aside as irrelevant, because sovereign immunity was held to bar the suit. In Tooahnippah on the other hand, the Supreme Court specifically refused to determine the exact scope of secretarial authority under 25 U.S.C. §373 in ruling that no matter how broad the scope of his discretion in the abstract, it did not include the power to disapprove the Indian will in the specific circumstances set forth in that case. Petitioners contend that under the Administrative Procedure Act they are entitled to judicial review on the merits which takes into account all of the facts and circumstances surrounding the challenged agency action.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL

The Court below adhered to its dicta in Washington v. Udall, supra, and held that the Administrative Procedure Act (5 U.S.C. §701 et seq.) does not constitute a limited waiver of sovereign immunity. Scanwell Labs. Inc. v. Schaffer, 424 F.2d 859 (D. C. Cir. 1970) held that where the provisions of the Administrative Procedure Act are applicable, "The ancient doctrine of sovereign immunity has no application." Id. at 873. The Scanwell decision points out that any other construction would make the review provision of the Administrative Procedure Act illusory. Thus, there is an irreconcilable and direct conflict of decision between the Courts of Appeal.

Cases in accord with Scanwell include:

Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied 393 U.S. 1025 (1969);
Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967);
Mulry v. Driver, 366 F.2d 544 (9th Cir. 1966);
Coleman v. U. S., 363 F.2d 190 (9th Cir. 1966), reversed on other grounds 390 U.S. 599 (1968);
Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961);
Adams v. Witmer, 271 F.2d 29, (9th Cir. 1958);

Cases in accord with Scholder, include:

Washington v. Udall, supra;
Motah v. United States, 402 F.2d 1 (10th Cir. 1968);
Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967).
White v. Administrator of GSA, 343 F.2d 444 (9th Cir. 1965);
Cyrus v. United States 226 F.2d 416 (1st Cir. 1955);

Clearly this much conflict, not only between the Courts of Appeal but also within various circuits, including the Ninth, can only be resolved by the Supreme Court and calls for the exercise of its plenary jurisdiction.*

The Scanwell line of cases is correct, among other reasons because the contrary view would completely emasculate 5 U.S.C. §706(2)(a). That section requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." The Scholder view has the effect of restricting the scope of that section to its last phrase, "otherwise not in accordance with law." All meaning is removed form "arbitrary, capricious, an abuse of discretion," because reviewability is rested entirely on the scope of statutory authority vested in an official.

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*Forum shopping, an evil usually attendant on conflicts among the circuits, is aggravated in this area by 28 U.S.C. §1391(e), which allows most suits against federal officers to be brought in at least two circuits.

III. THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION NOT PREVIOUSLY CONSIDERED BY THE SUPREME COURT IN THAT THE COURT BELOW DISREGARDED THE LIMITS WHICH AN AUTHORIZATION STATUTE PLACES ON AGENCY EXPENDITURES UNDER AN APPRORIATION ACT.

The spending authority of an agency such as the Bureau of Indian Affairs is limited and defined both by the authorization and appropriation statutes which together confer authority on the agency. The appropriation statute may never expand either the amount or scope of the agencys spending authority. Rules of the House of Representatives XXI.2; Standing Rules of the Senate XVI.1. (See Appendix). Petitioners argued below that 25 U.S.C. §13, the authorization statute applicable here, did not permit the challenged expenditure.

The Court below concluded however, that the actions of the defendant officers were made lawful by the relevant appropriations statutes.*

An expenditure pursuant to §13 may benefit both Indians and non-Indians jointly. An example would be an expenditure on the main pump or main line of an irrigation system serving both Indians and non-Indians. But it is undisputed, and was found by the court below, that the challenged expenditure was for the sole benefit of a non-Indian.

Although the Interior Department appropriation statutes themselves contain no express language that would lead one to believe that such an expenditure is proper, the court below relied on certain implications in the legislative history that some of the funds

*P.L. 88-356, 78 Stat. 275; P.L. 89-52, 79 Stat. 176 (See Appendix).

so appropriated to the BIA were intended to be used on Indian irrigation projects which served non-Indians. This reliance erroneously overlooks the fact that an Interior Department appropriation statute may be pursuant to any one of several authorization statutes. Many irrigation projects have been specifically authorized by Congress as joint Indian Bureau--Reclamation Bureau projects, to serve and benefit both Indians and non-Indians.* Expenditures for the sole benefit of a non-Indian under one of these other statutes might be lawful. But the broad appropriation statute cannot alter the limits placed upon the spending agency by the more specific authorization statute, 25 U.S.C. §13.

The court below construed 25 U.S.C. §309 as authorizing expenditures for non-Indians within Indian irrigation projects. While petitioners disagree, such authorization is, in any event, confined to situations in which Congress has specifically acted under 25 U.S.C. §389e and section 389 is thus inapplicable to the issue in this case.

The court also relied on 25 U.S.C. §§288, 289, and 297 as showing that Congress specifically excludes non-Indians from benefiting under Indian Programs when that is Congress'

---

* An exhibit produced by BIA officials in the trial court listed a number of Indian projects serving non-Indians. However, each and every project listed on the exhibit was a major undertaking authorized by a special statute rather than by 25 U.S.C. §13. See Department of the Interior, Federal Indian Law 294-303 (1958). The exhibit, therefore, is irrelevant in the instant case.

intent. The court then concluded that section 13 does not exclude expenditures for the sole benefit of non-Indians. But a reading of 25 U.S.C. §§288 and 289 shows the contrary proposition: that Congress specifically includes non-Indians where it so intends.*

IV. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE ADMINISTRATION OF INDIAN AFFAIRS.

In another context, the Ninth Circuit has referred to the gap between the lofty rhetoric and brutal reality in the administration of Indian affairs as a "gross national hypocrisy". United States v. Ahtanum Irrigation District, 236 F.2d 321, 338 (9th Cir. 1956), cert denied 352 U.S. 988 (1957), and 330 F.2d 897, and 338 F.2d 307 (9th Cir. 1964), cert. denied 381 U. S. 924 (1965). See also Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (concurring opinion of Mr. Justice Douglas, note 6).

Reservation Indians are victimized to a much greater extent by bureaucratic ineptitude than any other group. "Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that, the normal expectation on the reservation is that the Indian may not do anything unless it is specifically permitted by the government." Comment "The Indian: The Forgotten American", 81 Har. L. Rev. 1818, 1820 (1968). This all-pervasive bureaucratic control over Indian affairs makes the availability of judicial review even more essential than it is in other contexts. "[T]he the Bureau [of Indian Affairs] suffers from all of the

* 25 U.S.C. §297 is by its terms, irrelevant to this case.

defects frequently cited for bureaucracies, but in one important way it is unique: the quantum of power held by it over a subject people is sufficient to make common defects invidious." Comment, "Indians: Better Dead Than Red?" 42 So. Cal. L. Rev. 101, 113 (1969).

It is difficult to imagine more egregious agency action than that presented by the case at bar, as recognized in part III of the opinion below. Upholding so-called administrative discretion in these aggravated circumstances would reduce this nation's legislatively and judicially pronounced fiduciary obligation to its Indian beneficiaries to mere platitudes and further compound the "gross national hypocrisy". This case presents the opportunity for this Court to apply, and give concrete meaning to its statement respecting the "high standards for fair dealing" required by the United States in controlling Indian affairs," United States v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946) and "the generous and protective spirits which the United States properly feels toward its Indian wards," "Oklahoma Tax Commission v. United States, 319 U.S. 598, 607 (1943). "Unquestioning judicial deference to the Department of the Interior creates a universe for abuse of discretion." Comment, "Indians: Better Red than Dead?", supra at 125.

CONCLUSION

For reasons, set forth in this Petition Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: September 3, 1970

Respectfully Submitted,

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APPENDIX A

25 United States Code §13, 42 Stat. 208:

The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care and assistance of the Indians throughout the United States for the following purposes:

....

For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

....

5 United States Code §706, 80 Stat. 393:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law:

....

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right....

78 Stat. 273, 275:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums

78 Stat. 273, 275:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending June 30, 1965, and for other purposes, namely:

....

For construction, major repair, and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services by contract; $52,009,000, to remain available until expended....

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending June 30, 1966, and for other purposes, namely:

....

For construction, major repair, and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services by contract; $34,513,000, to remain available until expended....

House of Representatives Rule XXI ON BILLS

. . .

2. No appropriation shall be reported in any general bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order, except [exception not relevant]...

Rules of the House of Representatives of the United States: 88th Cong., H.Doc. 619, 87th Cong., 2d Sess. (1963) at p. 426; and 89th Cong., H.Doc. 374, 88th Cong., 2d Sess. (1965) at p. 426.

Senate Standing Rule XVI - AMENDMENTS TO APPROPRIATION BILLS

1. All general appropriation bills shall be referred to the Committee on Appropriations, and no amendments shall be received to any general appropriations bill the effect of which shall be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be to carry out the provisions of some existing law, or treaty stipulation, or act, or resolution previously passed by the Senate during that session, or unless the same be moved by direction of a standing or select committee of the Senate or proposed in pursuance of an estimate submitted in accordance with law.

. . .

Senate Manual, 88th Cong., Sen. Doc. 1, 88th Cong. 1st. Sess. (1963) at p. 17; Senate Manual, 89th Cong., Sen. Doc.1, 89th Cong., 1st Sess. (1965) at p. 17

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX SCHOLDER, Individually and on behalf of others similarly situated; PALA BAND OF MISSION INDIANS and RINCON BAND OF MISSION INDIANS, individually and on behalf of others similarly situated,

Appellants,

vs.

UNITED STATES OF AMERICA; DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; STEWART L. UDALL, Secretary of the Interior; ROBERT L. BENNETT, Commissioner, Bureau of Indian Affairs; WILLIAM E. FINALE, Director, Sacramento Office, Bureau of Indian Affairs; and JESS T. TOWN, Field Representative, Riverside, California Area Field Office, Bureau of Indian Affairs,

Appellees.

No. 24,306

[June 22, 1970]

Appeal From the United States District Court
for the Southern District of California

Before: BROWNING, DUNIWAY, and HUFSTEDLER, Circuit Judges.

HUFSTEDLER, Circuit Judge:

The Indian appellants, Scholder and the class of individual Indians he represents and the Pala and Rincon Bands, brought suit challenging the authority of the Bureau of Indian Affairs to expend funds appropriated for Indian irrigation systems to build an irrigation lateral on non-Indian land within the Pala Indian Irrigation Project and to charge a pro rata portion of the construction cost

to Indian lands in the project. Scholder is an Indian holder of a trust allotment within the Pala project who claims to represent all other Indian allottees within the project. The district court held that it lacked jurisdiction over Scholder's class action and dismissed the action as to them. It granted summary judgment against the remaining appellants, and this appeal followed.[1]

Willard Allers, a non-Indian, purchased from an Indian a 19-acre lot located in an area served by the Pala Indian Irrigation Project. That project supplies water to Indian and some non-Indian land, including Allers', within the project. Shortly after Allers purchased his property, he requested the Bureau of Indian Affairs, which administers the project, to construct a lateral connecting it with the project's central irrigation lines. The Bureau's district director granted the request. The cost of the lateral was estimated at $800. Before work on the lateral had progressed beyond the initial stages, appellants brought this action to enjoin further construction, a preliminary injunction issued, and construction has been stayed until the present time.

I.

Appellants' first set of claims challenges the expenditure for Allers' lateral as an unconstitutional taking, a conversion, an abuse of discretion, a breach of fiduciary duty, and as a payment unauthorized by Congress. We deal first with these claims as asserted against the United States, the Department of the Interior, and the Bureau of Indian Affairs.

The United States cannot be sued without its consent. Appellants argue that that consent is found in 25 U.S.C. § 345 and 28 U.S.C. §§ 1353, 1361, and 1362. 28 U.S.C. § 1361 provides no such consent: (*White v. Administrator of GSA* (9th Cir. 1965) 343 F.2d 444.) Nor do we see how 28 U.S.C. § 1362 can be read as doing so. The purpose of section 1362 was to eliminate the $10,000 jurisdictional requirement of 28 U.S.C. § 1331 for a particular class of suits, namely, federal-question actions brought by an Indian tribe or band. (*Quinault Tribe of Indians v. Gallagher* (9th Cir. 1966) 368 F.2d 648, *cert. denied* (1967) 387 U.S. 907; H.R. Rep. No. 2040, 1966 U.S. Code & Ad. News 3145-46.) Nothing on the face of section 1362 indicates an intention by Congress to waive sovereign

[1]The decision is reported at 298 F. Supp. 1282.

immunity, and we know nothing in its legislative history to suggest such a purpose.

Appellants place primary reliance upon 25 U.S.C. § 345, which grants district courts jurisdiction "to try and determine any action . . . involving the right of any person, in whole or in part in Indian blood or descent, to any allotment of land under any law or treaty . . ."[2] The section is a limited consent by the United States to suit (*e.g., Heckman v. United States* (1912) 224 U.S. 413, 441; *United States v. Halbert* (9th Cir. 1930) 38 F.2d 795, *rev'd on other grounds* (1931) 283 U.S. 753), and thus we must decide whether appellants' challenge to the Allers expenditure falls within the scope of that consent.

The section 345 consent is not restricted to suits to compel the issuance of an allotment in the first instance. It extends consent at least to certain kinds of suits designed to protect or preserve an allotment once issued. (*United States v. Pierce* (9th Cir. 1956) 235 F.2d 885; *Gerard v. United States* (9th Cir. 1948) 167 F.2d 951.)[3] In *Pierce*, for example, we rejected a Government contention that section 345 was limited to instances in which the Secretary of the Interior had unlawfully denied a specific allotment selection:

> "The contention is based upon an unreasonable limitation as to the purpose of the statute. So limited, the allotment might be made, but subject to such restrictions as would deny the Indian full possession of the land or illegal restraint as to its use, occupancy, or as to the produce therefrom, and he could do nothing about it but to complain with the hope of adjustment." (235 F.2d at 888.)

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[2] 28 U.S.C. § 1353 is a recodification of the jurisdictional portion of § 345. Judicial attention has centered on § 345, and we follow this practice. Appellants have not argued that their rights under § 1353 exceed their rights under § 345.

[3] *Pierce* and *Gerard* have undercut the sweeping statement in (although perhaps not the holding of) United States v. Eastman (9th Cir.) 118 F.2d 421, 423, *cert. denied* (1941) 314 U.S. 635, that § 345 authorizes only "suits to compel the making of allotments in the first instance." The same language is repeated in United States v. Preston (9th Cir. 1965) 352 F.2d 352, 358, but only as dictum; dismissal there was required because the plaintiff was non-Indian. We cannot read *Preston* as subsilentio overruling the holding in *Pierce* and *Gerard*.

The statement must be read, however, in the context of the claims advanced in *Pierce*: equalization of allotments, payment of income from withheld allotments, and apportionment of tribal waters.[4]

Appellants argue that their claim is similar to the claim in *Pierce* for the apportionment of tribal waters. We disagree. *Pierce* must be distinguished on the ground that an allotment grant includes, as a right appurtenant to the land, "the right to use some portion of tribal waters essential for cultivation . . . ." (*United States v. Powers* (1939) 305 U.S. 527, 532; *see* U.S. Interior Dept., *Federal Indian Law* (1958) 785-87.)[5] These appellants are not claiming denial of a right acquired appurtenant to their allotment. They are challenging the Bureau's administration of an Indian irrigation system. We cannot fairly say that one's right to an allotment includes as an incident of that right a guarantee of judicious administration of an irrigation project. The consent given in section 345 does not encompass appellants' challenge to the expenditure, and the district court properly dismissed the individual appellants' first set of claims against the United States. The Pala and Rincon Bands' expenditure claims against the United States should also have been dismissed for the same reason.

The Department of the Interior and the Bureau of Indian Affairs are merely administrative arms of the United States. Because the expenditure claims fail against the United States, they must also fail against the Department and the Bureau. (*See Simons v. Vinson* (5th Cir.) 394 F.2d 732, *cert. denied* (1968) 393 U.S. 968; *Chournos v. United States* (10th Cir. 1964) 335 F.2d 918.)

This brings us to the expenditure claims against the named officials. Courts "will indulge in the legal fiction that a suit against a government officer in his official capacity [is] not a suit against

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[4]While finding that § 345 would afford jurisdiction for an apportionment claim (235 F.2d at 887-89), the court nevertheless dismissed that claim because the facts alleged and proven were insufficient to support relief. 235 F.2d at 892.

[5]*See also* United States v. Preston, *supra* note 3, 352 F.2d at 357-58. But the court went on to say: "We think it is equally plain that the Indian allottee is not authorized by § 345 to sue the United States for the purpose of claiming or establishing any assignment or distribution of water rights, rights which he automatically acquired as a result of the creation of the reservation . . . ." 352 F.2d at 358. As explained in note 3 *supra*, this is dictum.

the sovereign, and hence not subject to defeat by the doctrine of sovereign immunity, only if (1) the officer's powers are limited by statute and his actions were ultra vires, or (2) the officer was acting unconstitutionally or pursuant to an unconstitutional grant of power from the sovereign." *Washington v. Udall* (9th Cir. 1969) 417 F.2d 1310, 1314.) Despite appellants' urgings to the contrary, neither exception is applicable here.

The defendant officials did not exceed statutory limitations on their authority. The funds used on the Aliers lateral were appropriated by Congress for the Bureau in 1965 and 1966 for "construction, major repair, and improvement of irrigation and power systems . . . ."[6] Although these funds were to be used only on Indian irrigation projects, we cannot discern a congressional intent that they be used only to benefit Indians. Indian irrigation projects have been sponsored and administered by the United States for over 80 years, and at all times the projects have served non-Indians as well as Indian lands within their boundaries. In the budget requests that led to the appropriations in question, the Bureau specifically mentioned non-Indian lands within Indian projects:

> "The development and extension of irrigation projects on Indian reservations are primarily for the benefit of resident reservation Indian families. The facilities, however, also directly benefit the surrounding community, as well as non-Indian-owned lands included within the projects."[8]

Chapter 11 of Title 25 of the United States Code, dealing with irrigation of "Indian allotments," again shows that Congress con-

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[6]Act of July 7, 1964, Pub. L. No. 88-356, 78 Stat. 273, 275; Act of July 28, 1965, Pub. L. No. 89-52, 79 Stat. 174, 176. The funds were to "remain available until expended." The Pala project is not specifically mentioned in either bill, but it was among the projects listed by the Bureau in its requests for the appropriations. *E.g., Hearings on H.R. 6767 Before the Subcomm. on the Department of the Interior and Related Agencies of the House Comm. on Appropriations*, 89th Cong., 1st Sess. (1965) 868. Each bill supplied $20,600 for the Pala project.

[7]*See generally* U.S. Interior Dept., *supra*, at 294-98; Investigation of the Bureau of Indian Affairs, H.R. Rep. No. 2503, 82d Cong., 2d Sess. (1953) 21 (575,000 of the 848,000 acres under irrigation on Indian reservations are Indian-owned); Memorandum of the Deputy Solicitor, Department of the Interior, Appendix B of Appellees' Brief (1968).

[8]*Hearings, supra* note 6, at 867. Identical language was used before both Houses of Congress for both bills.

templated non-Indian use of Indian projects. Section 389 authorizes the Secretary of the Interior to investigate irrigation charges levied upon "owners of non-Indian lands under Indian irrigation projects" and to recommend deferral of those charges in appropriate cases.[9] The section is analogous to section 386a, allowing for adjustment of charges against Indian-owned land.[10] Elsewhere Congress has set out a statutory plan for alienation of Indian allotments. (25 U.S.C. §§ 348, 349, 405, 483, 483a.)

Appellants agree that Congress intended non-Indian lands located within an Indian irrigation project to have access to the project. But they argue that Congress has not authorized expenditures, such

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[9] 25 U.S.C. § 389 provides in pertinent part:

"The Secretary of the Interior is authorized and directed to cause an investigation to be made to determine whether the owners of non-Indian lands under Indian irrigation projects . . . are unable to pay irrigation charges, including construction, maintenance, and operating charges, because of inability to operate such lands profitably by reason of lack of fertility of the soil, inadequacy of water supply, defects of irrigation works, or for any other causes."

Appellants argue that § 389 refers only to charges that arose when the land was Indian-owned, but that are now owned by a non-Indian purchaser. *Cf.* 80 Cong. Rec. 4482 (March 27, 1936) (remarks of Senator O'Mahoney). A full reading of the legislative history does not support this interpretation. The section was designed to ensure "that the owners of both lands [Indian and non-Indian] should be dealt with on the same basis," and only in "some instances" were the charges ones that accrued while the land was held by an Indian. H.R. Rep. No. 2369, 74th Cong., 2d Sess. (1936) 1, 2; *see also* S. Rep. No. 1715, 74th Cong., 2d Sess. (1936).

[10] 25 U.S.C. § 386a provides in part:

"The Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made: *Provided*, That the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished, and any construction assessments heretofore levied against such lands in accordance with the provisions of section 386 of this title, and uncollected, are hereby canceled . . . ."

as the Allens lateral, that benefit *solely* a non-Indian. A Bureau irrigation expenditure may benefit solely Indians, or it may benefit Indians and non-Indians alike by improving the communal segments of the project. But Bureau officials have no authority, appellants claim, to expend money for the sole benefit of non-Indians.

When it sought the 1962 and 1967 appropriations, the Bureau indicated that some of the funds would be expended on noncommunal elements of irrigation projects. Included in its requests were funds for "laterals, land clearing and leveling"—undertakings which, when viewed individually, benefit only one or a few parcels of land. There is no suggestion in the history of the appropriation bills, or in the statutory scheme relating to irrigation projects in general, that Congress intended noncommunal expenditures to be administered differently for Indian beneficiaries than for non-Indian beneficiaries. Appellants have not argued to the contrary. Their claim is based on 25 U.S.C. § 13, which provides general authorization for the Bureau to expend moneys:

> "The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> ". . .
>
> "For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies."

We do not read section 13 as requiring that every individual irrigation expenditure be "for the benefit, care, and assistance" of Indians. That interpretation would present federal courts with the intolerable task of reviewing individual Bureau expenditures and speculating in each instance about potential beneficiaries.[11] Congress has not instructed us to undertake this task, in clear terms or

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[11] The Government has argued that even the Allens expenditure benefits Indians: The value of Indian-owned land is increased because a non-Indian purchaser might have a lateral built at Government expense. We repeat this argument, not to suggest that we think it persuasive but to show that speculation is often required in determining who benefits from a particular expenditure.

otherwise. Section 13 authorizes expenditures for Indian irrigation projects, and the Pala project, viewed as a whole, is operated for the benefit and assistance of Indians. (At least, there is no claim to the contrary.) The Allers expenditure extends and improves the Pala project, and therefore is authorized by section 13. If Congress had wanted to impose on the Bureau the restrictions urged by appellants, it could have done so easily. Similar restrictions have been made by Congress on educational expenditures by the Bureau. (25 U.S.C. §§ 288, 289, 297.) But we cannot imply from section 13 these restrictions on irrigation expenditures. We must conclude that the individual officials did not act outside their statutory authority in approving the Allers expenditure.

We also reject appellants' claim that the expenditure was an unconstitutional taking of funds held in trust for Indians. The funds in question were "gratuitous appropriations of public moneys"; they were not treaty or tribal funds "belonging really to the Indians" and held in trust by the United States. (*Quick Bear v. Leupp* (1908) 210 U.S. 50, 81.) Use of public moneys to benefit non-Indians is not a taking of Indian property. Consequently, sovereign immunity bars the claim against the individual officials, even if their actions were tortious or the outcrop of bad judgment. (*Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U.S. 682; *Turner v. Kings River Conservation District* (9th Cir. 1966) 360 F.2d 184, 186 n.19.)[12]

II.

Appellants' final claims concern reimbursement charges arising out of the Allers expenditure. The Bureau has stated its intention of treating the expense of the lateral, as a reimbursable cost, allocable on a per-acre basis against all irrigable land within the Pala project. (25 C.F.R. § 211.4a(a).) Appellants sought injunctive and declaratory relief, contending that the imposition of such charges was both unauthorized and an unconstitutional taking without just compensation.

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[12]Appellants had also alleged that Bureau officials made an unauthorized agreement with Allers that he would be given a lateral if he purchased the land in question. The district court found that no such agreement was made. Neither party has disputed the appropriateness of this case for summary judgment.

The district court held that it had no jurisdiction to hear these claims as asserted by appellant Scholder and the individual Indian allotment holders whom he represents. We think otherwise. As we said earlier in discussing 25 U.S.C. § 345, that section is not limited to actions seeking to compel the issuance of an allotment in the first instance. It serves also to protect "the interests and rights of the Indian in his allotment or patent after he has acquired it." (*United States v. Rizzo*, *supra*, 255 F.2d at 889.) Irrigation construction charges levied against Indian land are not collectible until after the Indian title to the land has been extinguished. At that time the deferred charges are immediately collected. (25 U.S.C. § 386a; 25 C.F.R. § 211.5a(b).) The deferred charges amount to a lien on the Indian's allotment, reducing its sale value. (*See* 25 C.F.R. § 211.2.) The imposition of construction charges affects an Indian's "interests and rights" to his allotment, and he can challenge the validity of charges under section 345.

We remand this phase of the case to the district court for a determination of the validity of the charges. The issue was not fully examined below, in part because those appellants who had a day in court (the Pala and Rincon Bands) did not emphasize this aspect of the case. Undoubtedly the issue is of more concern to the individual allotment holder than it is to the Bands. The issue was not fully briefed before this court. The appellees failed to direct our attention to any authorization for the imposition of the charges, pointing instead to statutes authorizing the assessment of construction charges *where reimbursement is authorized*.[13]

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[13] 25 U.S.C. §§ 385, 386. Section 386 is a directive to the Secretary of the Interior to start collection of construction charges "where reimbursement is required by law." Section 385 authorizes the fixing of maintenance charges for Indian projects, but its authorization for the apportionment of construction charges is limited to those charges "made reimbursable out of tribal funds." (The section actually refers to appropriation of "the cost of any irrigation project constructed for Indians . . . ." The Department of the Interior has taken this as referring to construction charges. Opinion of the Solicitor (Sept. 9, 1929) 52 I.D. 709, 712.) The parties agree that the Allers lateral is a construction cost, rather than a maintenance or operating cost. *Cf.* Opinion of the Solicitor (Aug. 17, 1945), 59 I.D. 92. There is no mention of reimbursement in the 1964 and 1965 appropriation bills; specific language found in earlier bills requiring reimbursement is entirely lacking. *Compare, e.g.*, Act of March 2, 1934, Pub. L. No. 169, 48 Stat. 362, 370.

III.

We feel obliged to add that the Bureau's conduct, as reflected by the record before us, borders on the shocking. At best, it reflects gross insensitivity. The United States has a high moral obligation to the American Indian, and Congress has entrusted the officials of the Bureau of Indian Affairs with the responsibility of meeting that obligation. We have no doubt that the Bureau failed to meet its responsibility in the instant case. Over 45 percent of the Indian acreage within the Pala project is without functioning laterals. The soil is naturally very arid. In past years Indian landowners, as well as representatives of the Pala Band, have made numerous requests to the Bureau for the construction and repair of laterals, and the Bureau's uniform response was that no moneys were available. The former owners of the Allers property were Pala Indians; and they were forced to give up the allotment after their fruit trees died for lack of water. Their requests to the Bureau for repair of the lateral were refused, and the land was completely without water. Yet shortly after Allers, a non-Indian, purchased the property, the Bureau agreed to build a lateral that would benefit solely his land. At the time the briefs for this appeal were filed, the Bureau had approved no other laterals in the Pala project.

Perhaps there are exceptional circumstances that justify the Bureau's expeditious handling of the Allers request while, temporarily at least, bypassing the requests of Indian residents of years' standing. If so, they have never been revealed to the understandably indignant Indians within the project.[1] It is hardly

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[1] The Government has offered reasons, but they are far from compelling. First, the Government states that Allers was the only "timely" request, in that his was made after the 1961 appropriation while those of the Indians were made prior to the appropriation. Thus, the Bureau would place on the Indians the burden of keeping a continually watchful eye on congressional appropriations. That is the Bureau's job. And, to our mind, it is the Bureau's job to give due consideration to requests that anticipate an appropriation, rather than to ignore them.

Second, the Government suggests that Allers was deserving of special treatment because when he purchased his property Allers paid $1280.47 in deferred irrigation charges that had accumulated on the land. But payment of the deferred charges is required by statute (25 U.S.C. § 386a) and represents a proportional share of extant projects; it does not entitle the purchaser to special privileges respecting new expenditures.

surprising that the Bureau's actions have inspired a lawsuit. Its officials should find no satisfaction in our conclusion that, after two years of costly litigation, sovereign immunity shields their decision from judicial scrutiny.

The judgment is affirmed in part and reversed in part, and the cause is remanded to the district court for proceedings consistent with the views herein expressed.

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APPENDIX C

298 FEDERAL SUPPLEMENT 1282

Alex SCHOLDER, individually and on behalf of others similarly situated, Plaintiffs,

v.

UNITED STATES of America; Department of the Interior; Bureau of Indian Affairs; Stewart L. Udall, Secretary of the Interior; Robert L. Bennett, Commissioner, Bureau of Indian Affairs; William E. Finale, Director, Sacramento Office, Bureau of Indian Affairs; and Jess T. Town, Field Representative, Riverside, California Area Field Office, Bureau of Indian Affairs, Defendants.

No. 68-224-S.

United States District Court
S. D. California.
April 23, 1969.

MEMORANDUM OF DECISION

SCHWARTZ, District Judge.

This is a class action brought by individual Indians and Indian bands to enjoin the Secretary of the Interior and the Bureau of Indian Affairs from spending Indian irrigation project funds for the benefit of a non-Indian owner of land which is situated within an Indian irrigation system. The cause came on to be heard upon the parties' cross-motions for summary judgment.

The original complaint seeking declaratory and injunctive relief, filed on September 16, 1968, was brought by Alex Scholder, as an individual on behalf of himself and all other Indians similarly situated. An amended complaint filed on September 27, 1968, named the Pala Band of Mission Indians and the Rincon Band of Mission Indians as additional plaintiffs, on behalf of themselves and all other Indian tribes similarly situated.

Upon filing their action, plaintiffs moved for a preliminary injunction and temporary restraining order enjoining further expenditure of money for construction of a lateral pipeline allegedly benefitting only a non-Indian. This court issued a temporary restraining order on September 16, 1968, which was extended on September 23, 1968. Defendants moved to dismiss and vigorously resisted issuance of a preliminary injunction, principally on the grounds that this court had no subject-matter jurisdiction. After a hearing, a preliminary injunction was issued on October 3, 1968.

[1–3] The court found that it had jurisdiction only over the claims of the plaintiff Indian tribes under 28 U.S.C. § 1362. The claims of the individual plaintiffs, Alex Scholder and the class of individuals represented by him, were dismissed for lack of subject-matter jurisdiction upon a determination that no jurisdiction in this case was conferred by 28 U.S.C. §§ 1353, 1361 or 25 U.S.C. § 345. As stated in this court's order filed on October 3, 1968, no jurisdiction over the individual plaintiffs' claims is conferred by 28 U.S.C. § 1353, or 25 U.S.C. § 345 because no claim for an original allotment or for an allotment in the first instance is involved here. See United States v. Eastman, 118 F.2d 421 (9th Cir. 1941); United States v. Preston, 352 F.2d 352 (9th Cir. 1965); Prairie Band of Pottawatomie Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963); Seifert v. Udall, 280 F.Supp. 443 (D.Mont.1968). Nor has this court jurisdiction pursuant to 28 U.S.C.A. § 1361 inasmuch as said section authorizes mandamus only to compel performance of a ministerial duty or to compel a discretionary decision where no decision has been made. Seebach v. Cullen, 224 F.Supp. 15 (D.Cal.1963); Hill v. United States Board of Parole, 257 F. Supp. 129 (D.C.Pa.1966). In the instant case, as will appear in the discussion of the merits, the court is asked to adjudge the propriety of a discretionary decision already made by the Secretary through the Bureau.

[4, 5] Jurisdiction over the claims of the Pala Band of Mission Indians and the Rincon Band of Mission Indians is conferred by 28 U.S.C. § 1362 inasmuch as a real and substantial controversy as to the construction and effect of certain statutes and constitutional provisions is alleged. However, section 1362 does not authorize jurisdiction over the claims of individual Indians. Quinault Tribe of Indians of Quinault Reservation in State of Washington v. Gallagher, 368 F.2d 648 (9th Cir. 1966), cert. den., 387 U.S. 907, 87 S.Ct. 1684, 18 L.Ed.2d 626. Nor should this court assume pendent jurisdiction of the individual plaintiffs' claims under the principles of Hurn v. Oursler, 289 U.S. 283, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), and cases following that decision, since in this case two distinct groups of plaintiffs each state their own causes of action (albeit the same theory of recovery), and only one of such groups has a primary right to be in federal court at all. This is to be distinguished from the case where two theories, one based on state law and one based on federal law, are asserted by one plaintiff who has a substantial federal claim. In the latter case, the court can assume pendent jurisdiction of the plaintiff's state claim as well as the federal claim. The individual plaintiffs herein have noticed their intention to appeal from dismissal of their claims on jurisdictional grounds.

Defendants moved to dismiss for the second time on November 20, 1968, on dual grounds: (1) lack of subject-matter jurisdiction under 28 U.S.C. § 1362; and (2) failure of the complaint to state a claim upon which relief can be granted (F.R.Civ.P., Rule 12(b) (6)). Defendants argued in particular that plaintiffs' claims regarding exclusive rights of Indians under federal appropriations statutes were patently frivolous, and affidavits were submitted by defendants which, *inter alia*, set out the appropriations statutes in question.

[6] Inasmuch as the difficult jurisdictional question raised by the defendants' second motion to dismiss went also to the very merits of plaintiffs' claim, this court assumed jurisdiction in order to rule on the merits. There is strong authority for such procedure where the questions of jurisdiction are inseparable from the merits of the claim. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); T. B. Harms Company v. Eliscu, 339 F.2d 823 (2nd Cir. 1964); Congress of Racial Equality v. Clemmons, 323 F.2d 54 (5th Cir. 1963).

[7] Defendants' motion to dismiss for failure to state a claim pursuant to Rule 12(b) (6) was then considered as a motion for summary judgment, as required by Erlich v. Glasner, 374 F.2d 681 (9th Cir. 1967), where the court has before it matters submitted which are outside the pleadings of the parties. Further hearing was continued to allow all parties reasonable opportunity to file affidavits pursuant to Rule 56, Fed.R. Civ.P.

Plaintiffs filed on January 8, 1969, their own motion for summary judgment, and all parties filed proper affidavits as to the facts pursuant to Rule 56(c). Oral argument was heard on January 31, 1969.

It is the finding of the court, based upon the stipulations and affidavits of the parties, that this case is appropriate for summary judgment since no genuine issues of material fact remain to be tried.

The material facts are undisputed. Willard Allers, a non-Indian, owns certain real property located within an area served by the Pala Indian Irrigation Project. The irrigation project is administered by the Bureau of Indian Affairs of the Department of the Interior, and serves all lands within a certain area, whether owned by non-Indians or by members of the Pala Band of Mission Indians. As shown by the map which is Exhibit "A" to the affidavit of Alex Scholder filed on January 30, 1969, Willard Allers owns lots 26, 27 and 28; lots adjacent to Allers' are owned, as allotments, by Indians, one among them being Alex Scholder. Said map reveals that Allers' land has access to a main water pipeline, which runs along Temecula Avenue, only by virtue of a narrow neck of land running east from lot 26 for some hundreds of feet to Temecula Avenue. An unpaved road lies along this neck of land which is depicted well by photographs submitted as exhibits to the affidavit of Alex Scholder filed on January 30, 1969. It is unclear whether Allers purchased the land directly from an Indian or from the Government. However, the affidavit of Josephine Jackson, a former Indian allottee of Allers' land, states that her interest was transferred to her cousin Juliana Calac in 1966, the year of purchase by Allers.

When Allers purchased the land, he paid over $1,200.00 in accumulated pro-

rata irrigation project construction charges [Letter of August 23, 1968, from Richmond F. Allan, Deputy Solicitor, Department of the Interior.] Allers requested of the Bureau of Indian Affairs that the water be supplied to his land. There was insufficient evidence submitted to determine whether Allers was promised new lines as a condition of purchase or subsequent to purchase requested new lines or possibly repair of any old lines which may have become defunct. The letter by Deputy Solicitor Allan indicates that old lines had become inoperable; cf. affidavit of Josephine Jackson. The instant controversy arises out of the Bureau's decision to construct a new lateral irrigation line from the Temecula Avenue main line to Allers' lots, the new line to run along the narrow neck of land to lot 26 as depicted by the aforementioned photographs submitted as exhibits. The estimated cost of the new line is approximately $800.00. It is undisputed that said construction, when completed, would directly benefit only Allers' land; an affidavit submitted by defendants' engineers, Norman L. Saigmaust and William F. Cheffey, supports this finding. It is also undisputed that the funds from which the proposed construction of the lateral service pipeline would be financed were appropriated in 1965 and 1966 under the terms of Public Laws 88-256 (78 Stat. 275) and 89-52 (79 Stat. 176), which provide, *inter alia*, for the construction and repair of Indian irrigation systems. Before construction of the new line could progress beyond the initial stages, plaintiffs brought the instant action.

Plaintiffs assert that Indians, as opposed to non-Indians, must be the primary beneficiaries of funds appropriated for construction and repair of irrigation projects such as that involved here. It is contended that where some Indians' needs for irrigation water are going unmet, the expenditure of funds benefitting a non-Indian as in the present case constitutes a "taking" without due process in violation of the Fifth Amendment of the United States Constitution, a breach of fiduciary duty owed to the Indians by the Government, and an abuse of the discretion granted to the Secretary and the Bureau regarding disbursement of monies appropriated for Indian irrigation projects. Defendants have not disputed the affidavits submitted by plaintiffs which show that some Indians have been unsuccessful in their applications to the Bureau for irrigation construction to bring water to their dry lands, particularly the affidavit by Josephine Jackson. It should be noted, however, that Jackson's affidavit refers specifically only to requests for water made in 1961 or earlier, before the funds in question here were even appropriated. It should also be noted that the main pipeline on Temecula Avenue lies along the eastern edges of the lands owned by Indians adjacent to Allers' land, whereas Allers' land has access to said mainline only by the narrow neck of land mentioned above [See map, Exhibit "A", Affidavit of Alex Scholder]. Furthermore, defendants admit that the construction costs for the lateral line on Allers' property will be assessed against all land within the irrigation system on a pro-rata basis as provided by statute. But in this connection, it should be considered that under 25 U.S.C. § 386a no such charges will be collected directly against Indian holders of allotments.

The decisive question is one of law; Whether in the circumstances of this case the Secretary of the Interior and the Bureau of Indian Affairs have authority to expend irrigation project funds for the sole, direct benefit of lands which are located within an irrigation project and which are owned by a non-Indian.

Plaintiffs bottom their "primary benefits" theory upon the statutory language found in 25 U.S.C. §§ 381–390 and upon the congressional intent in enacting P. L. 88–356 (78 Stat. 275) and P. L. 89–52 (79 Stat. 176), the statutes by which the funds to be expended for the pipeline to Allers' land were appropriated.

Although the sad history and plight of Indians in this country justifiably arouses sympathy, it is this court's duty ... to apply sound legal concepts and precedent to the resolution of the question presented herein. It must be concluded that the law does not bear out plaintiffs' claims.

The plaintiffs have not been able to present clear evidence of congressional intent behind the appropriations statutes for 1965 and 1966, P. L. 88–356 (78 Stat. 275) and P. L. 89–52 (79 Stat. 176), to support their claims. The pertinent language of the statutes is entirely too broad, specifying only that the monies are to be used "* * * for construction, major repair, and improvement of irrigation and power systems, * * *." P. L. 88–356; P. L. 89–52. Furthermore, the legislative history excerpted from congressional hearings and reports by plaintiffs appears ambiguous. The language cited by plaintiffs, insofar as it does apply to the appropriations statutes in question, is not at all inconsistent with an intent of Congress to provide indirect benefits to Indians through encouragement of regional land development which includes non-Indian-owned land within Indian irrigation projects.

Such an intent is reinforced by the language of 25 U.S.C. § 389, which includes the following:

> "The Secretary of the Interior is authorized and directed to cause an investigation to be made to determine whether the *owners of non-Indian lands under Indian irrigation projects* * * * are unable to pay irrigation charges * * *. Where the Secretary finds that said landowners are unable to make payment due to the existence of such causes, he may adjust, defer, or cancel such charges, in whole or in part, as the facts and conditions warrant."
>
> 25 U.S.C. § 389 (emphasis supplied).

Thus, Congress clearly contemplated ownership of irrigated land by non-Indians within an Indian irrigation project. Furthermore, section 389 provides for benefits to such non-Indian owners, viz., cancellation of pro-rata charges for irrigation system construction in some circumstances. [See 25 U.S.C. Supp. (1968), pp. 38–39 for recent laws implementing § 389.] The benefits to non-Indian owners under § 389 are somewhat analogous to the benefits to Indians under § 386a, which provides that no pro-rata construction charges will be assessed so long as the land remains in Indian hands.

The intent to benefit non-Indians expressed in § 389 is nowhere inconsistent with the total statutory scheme of 25 U.S.C., Chapter 11. If congressional intent were to the contrary as plaintiffs contend, it would have been a simple matter for Congress to clearly express it by statute, either in Title 25, U.S.C., or as a condition inserted in the appropriations statutes. The failure of Congress to do so is especially significant in light of the long history of substantial and numerous expenditures which have benefited non-Indian-owned lands within the

Indian irrigation projects across the nation. See the chart provided by William Finale, Area Director, Sacramento Area Office, Bureau of Indian Affairs, in the Answers to Interrogatories filed January 24, 1969, Page 2. It should also be noted that Congress has enacted a general statutory plan for alienation of Indian allotments in Title 25, U.S.C., §§ 348, 349, 392, 404, 483 and 483a (in particular, § 349).

[8,9] Section 381, Title 25, U.S.C., grants discretion to the Secretary of the Interior to administer funds appropriated by Congress. Past practice and the language of § 389 has revealed that Congress did not intend the Secretary to be restricted as plaintiffs argue here. Rather, for the reasons stated above, it appears that the better view is that the Secretary and the Bureau have statutory authority to expend funds for the benefit of lands located within Indian irrigation projects without regard to whether the lands are owned by Indians or non-Indians. Thus, the proposed expenditure does not constitute an unconstitutional "taking" in violation of the Fifth Amendment, a breach of duty, or an abuse of discretion.

To grant plaintiffs' motion for summary judgment would be to ignore the statutory plan for irrigation of Indian lands, 25 U.S.C., Chapter 11 (§§ 381–390) and in particular § 381, which grants discretion to the Secretary, and § 389, which provides for specific benefits to non-Indians, to ignore the general statutory scheme for allotment and alienation of Indian lands, and to ignore the unrestrictive language of the appropriations statutes in question.

Even if plaintiffs' basic "primary benefits" theory, contrary to this court's decision here, were properly substantiated, it does not necessarily follow that the construction project for the benefit of Allers' land in this case would be inconsistent with it. Viewed in the total context of the properties' locations and the money expended for the pipeline, the following facts are particularly significant: (1) The purchase price Allers paid for the land in question included over $1,200.00 in accrued irrigation costs [U.S. Attorney's affidavit, filed September 20, 1968, pg. 2], yet the estimated cost of bringing water to Allers' land by the construction challenged here is approximately $800.00 out of total appropriations of $40,000.00 from the 1965–1966 appropriations statutes aforementioned; and (2) the location of Allers' land is such that he has considerably less access to the main water pipeline running down Temecula Avenue than do the Indians owning adjacent lands. Under these circumstances, it does not appear that Allers is being singled out for unduly favorable treatment. The excess of accrued irrigation charges over and above the cost of the pipeline to Allers' land is probably a net gain for the irrigation project as a whole, and thus indirectly is a net benefit to Indian owners of lands served by the project.

Thus, for the reasons stated above, the plaintiffs' motion should be denied, the preliminary injunction should be dissolved, and the defendants' motion for summary judgment should be granted.

Separate judgment shall be filed. This opinion and memorandum of decision shall serve as findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

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No. 665

In the Supreme Court of the United States

OCTOBER TERM, 1970

ALEX SCHOLDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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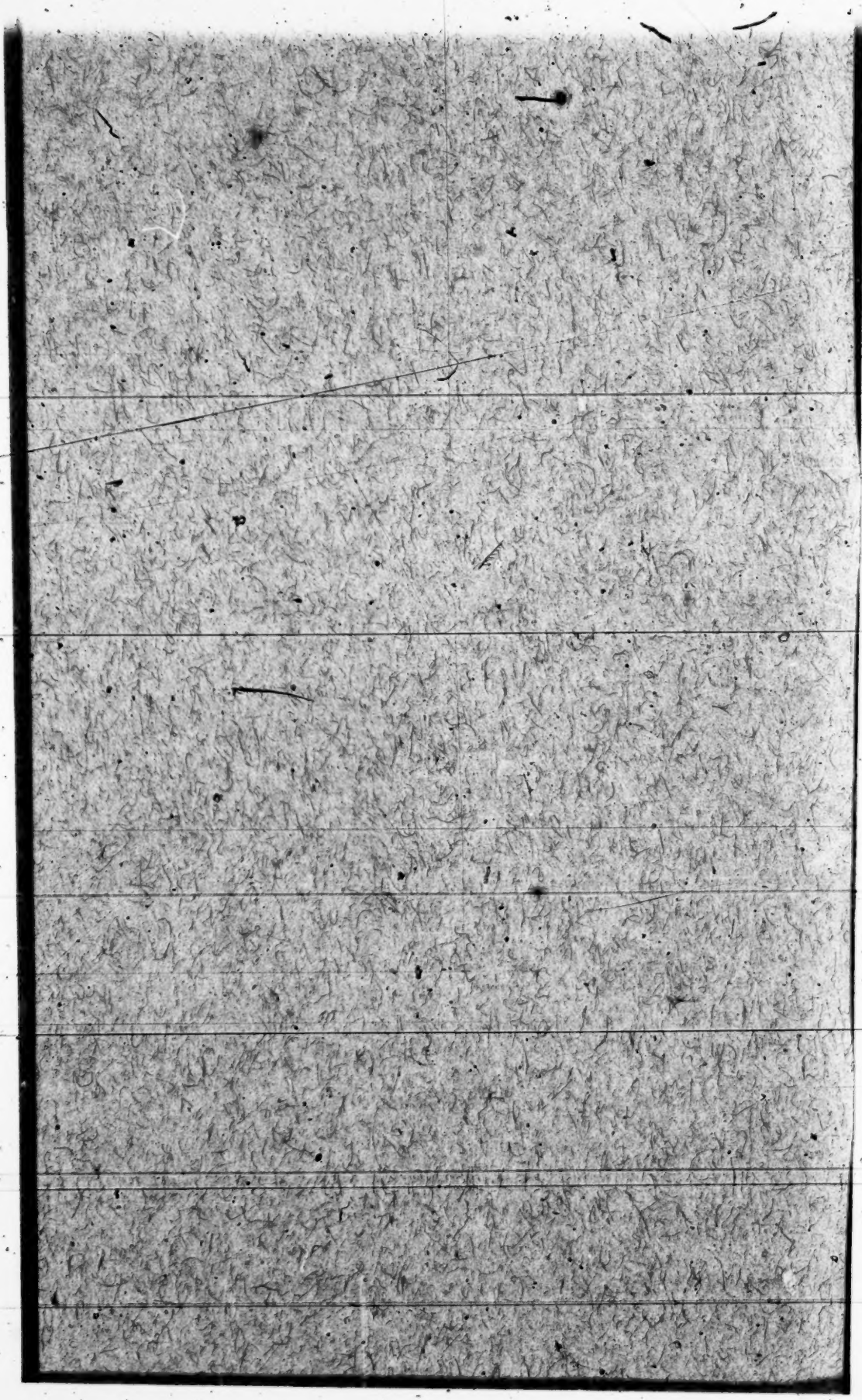

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OPINIONS BELOW

The opinion of the Solicitor, Department of the Interior (App. A, *infra*, pp. 9–12), is not reported. The opinion of the district court (Pet. App. C) is reported at 298 F. Supp. 1282. The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1970. A timely petition for rehearing was denied on July 21, 1970. The petition for a writ of certiorari was filed on September 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the expenditure in this case of federal funds for the irrigation of lands owned by a non-Indian within an Indian irrigation project on a reservation was authorized.

2. Whether the district court lacked jurisdiction to grant specific relief against the United States, the Department of the Interior, the Bureau of Indian Affairs, and named federal officials, enjoining the expenditure.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix B, *infra*, pp. 13–17.

STATEMENT

Alex Scholder, an Indian allottee, as representative of a class, and the Pala and Rincon Bands of Mission Indians brought this suit to enjoin use of funds appropriated by Congress for Indian irrigation systems for construction of a pipeline which would allegedly benefit only lands owned by a non-Indian, Willard Allers. The apportionment of construction costs (totaling approximately $800) to all lands within the system, including Indians lands, was also challenged.[1] At issue were 1965 and 1966 appropriation statutes (App., *infra*, pp. 16–17) which, *inter alia*, appropriated $40,000 "For construction, major repair, and improvement of irrigation and power systems * * *." The United States, the Secretary and the Department of

[1] These costs cannot be collected so long as title remains in Indians. See 25 U.S.C. 386a.

the Interior, the Bureau of Indian Affairs, and certain officials of the Bureau were named as defendants. Allers was not joined. After hearing, and on cross-motions for summary judgment, the district court dismissed Scholder's claims for lack of jurisdiction, and granted summary judgment against the Pala and Rincon Bands.

The court of appeals affirmed, holding that sovereign immunity barred the claims against the United States, since 28 U.S.C. 1331, 1361, and 1362, and 25 U.S.C. 345, the only statutes relied upon by petitioners, did not constitute consent by the United States to suits of this type. The court also ruled that the action could not be maintained against the Department of the Interior or the Bureau of Indian Affairs, and approved dismissal of the suit against the officials on the ground that they had acted within their delegated statutory authority and not pursuant to an unconstitutional statute. However, since 25 U.S.C. 345 (App. *infra*, p. 14) protects Indian allotment rights and supplies limited consent to suit, the court remanded to the district court the issue whether apportionment of construction costs among all lands within the irrigation project was proper. Finally, the court observed that, although Allers' was the only request made after the appropriations, Indians had asked for irrigation in prior years when no funds were available and the Bureau's failure to treat those requests as still "pending" was deplorable, although insulated from judicial scrutiny.

Petitioners sought rehearing but this was denied without opinion.

ARGUMENT

Aside from the contention with respect to the Administrative Procedure Act, discussed *infra* (pp. 5–6), the only question presented is whether the Department of the Interior was authorized to expend funds for a pipeline in an Indian irrigation project for a non-Indian. The authorization is plain. Congress long ago recognized that some lands within Indian irrigation systems were owned by non-Indians and intended to place Indian and non-Indian owners on equal footing. See 25 U.S.C. 389 (App. *infra*, p. 15); S. Rep. No. 1715, 74th Cong., 2d Sess., p. 2. Moreover, Congress was apprised in the budget requests that the appropriations in question would be used in part for non-Indian landowners.[2] And, as the Solicitor of Interior commented (App. *infra*, p. 11):

> This contention [that such funds may be expended only for the benefit of Indian owners of land] ignores over half a century of legislative and administrative activity and the essential nature of an irrigation project.

The court of appeals agreed (Pet. App. B 5):

> Indian irrigation projects have been sponsored

[2] Hearings, Senate Subcommittee of the Committee on Appropriations, H.R. 6767, 89th Cong., 1st Sess., p. 685; Hearings, House Subcommittee of the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1966, 89th Cong., 1st Sess., p. 867; Hearings, Senate Subcommittee of the Committee on Appropriations, H.R. 10433, 88th Cong., 2d Sess., p. 181; Hearings, House Subcommittee of the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1965, 88th Cong., 2d Sess., p. 861.

> and administered by the United States for over 80 years, and at all times the projects have served non-Indians as well as Indian lands within their boundaries. * * *[3]

This congressional and executive understanding and practice over a substantial period of time should be upheld in construing the applicable statutes. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16–18; *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293–294; *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 735–736.

Since the federal officials here acted within their statutory authority and not pursuant to an unconstitutional statute, the suit to enjoin them was properly dismissed for lack of jurisdiction. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609.

2. Petitioners contend that the Administrative Procedure Act, 5 U.S.C. (Supp. V) 701 *et seq.*, is a limited waiver of immunity and that the court of appeals erred in not so holding. But this contention was neither pre-

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[3] Both courts below also recognized that an expenditure for a non-Indian may benefit Indians by improving the general system: "The Allers expenditure extends and improves the Pala project * * *," which, "viewed as a whole, is operated for the benefit and assistance of Indians," and "speculation is often required in determining who benefits from a particular expenditure." The courts, therefore, properly declined "the unenviable task of reviewing individual Bureau expenditures and speculating in each instance about potential beneficiaries." (Pet. App. B 7–8, and note 11; Pet. App. C 11.)

[4] Petitioners also charge that the administrative practice—of not treating past Indian requests as "alive" until funds are appropriated and then acting on them—is "arbitrary and

sented to, nor passed on by, either court below. The Administrative Procedure Act was not mentioned in either petitioners' brief or their reply brief in the court of appeals; petitioners' entire argument on this point was that the officers of the Bureau had acted beyond their statutory authority. That Act was first cited on appeal by petitioners only in the petition for rehearing, which the court of appeals properly denied without opinion.

Thus, in view of the posture of petitioners' claim and the fact that this is not a suit to challenge administrative rejection of Indian requests for irrigation improvements, this case is inappropriate for resolving the issue posed by the Administrative Procedure Act.

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capricious." But it was inappropriate to attempt to correct that practice by suing to enjoin an authorized expenditure for a non-Indian.

Contrast *Washington* v. *Udall*, 417 F. 2d 1310, 1319–1321 (C.A. 9), and cases cited there and in the dissenting opinion, *id.* at 1323 n. 1.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
S. BILLINGSLEY HILL,
RAYMOND N. ZAGONE,
Attorneys.

OCTOBER 1970.

[6] In light of the court of appeals' criticism of the government's administration of this irrigation project, we have inquired about post-record developments (all of which are matters of public information). We are informed by the Department of the Interior that since Allers' request in 1967, there have been three requests by Indians for irrigation service in this project. Each of these requests was granted and a total of nearly $3200 for construction costs was expended. In addition, in the fiscal years since 1967, more than $37,000 in operation and maintenance funds has been spent on the Pala Indian Irrigation Project.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C. 20240, August 23, 1968.

Memorandum to: Commissioner, Bureau of Indian Affairs

From: Solicitor

Subject: Authority to construct or rehabilitate irrigation facilities serving non-Indians on Indian reservations.

Your memorandum of July 18, 1968, asks whether funds of the United States appropriated by Congress for the construction, repair and improvement of Indian irrigation systems (see e.g., Interior Appropriation Act for fiscal year 1968, 81 Stat. 59, 61) may be used to construct a lateral to serve non-Indian land within an Indian irrigation project.

The question is raised in connection with plans of the Bureau of Indian Affairs to install a pipeline from a canal to serve originally allotted land within the Pala irrigation project on the Pala Indian Reservation, California, which land was purchased in 1966 by a non-Indian. The purchase price included the payment of $1,280.47 of accrued irrigation costs, and the purchaser executed a contract on Form 5-462b whereby he agreed to pay future irrigation charges assessed against the land. 25 CFR 121.21 and 128.1.

A pipeline which formerly served the land has become inoperable by reason of disuse. The purchaser

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has requested delivery of water to the land, and the Bureau plans to install approximately 900 feet of pipe which, by extension, could also be used to serve adjoining Indian-owned land in the project. The cost of installing the pipe would be treated as a reimbursable cost of the project and allocated on a per acre basis against all land therein. 25 U.S.C. 385 and 386; 25 CFR, Part 211.

A representative of California Rural Legal Assistance has challenged the Bureau's plans on the ground that it is not legally permissible to use appropriated funds for this purpose. He also complains that the Bureau is requiring Indian owners of trust land within the Pala project to pay outstanding construction charges allocated to their land before it permits them to benefit from the expenditure of funds appropriated for the project.

The latter complaint must be based upon a misunderstanding. Section 386a of Title 25 of the United States Code provides in part:

> * * * the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished. * * *

Under this provision the assessment of costs of construction allocated to Indian-owned land within the project is deferred. No attempt is made to collect such costs from the Indian owners of trust land within the project, and such owners are entitled to participate, equally with other owners of land in the project, in benefits resulting from the expenditure of appropriated funds.

The gravamen of the challenge to the Bureau's authority to use appropriated funds for the purpose proposed is that such funds can be expended only for the direct benefit of Indian owners of land within a project and not for the benefit of non-Indians. This contention ignores over half a century of legislative and administrative activity and the essential nature of an irrigation project.

Generally, an irrigation project is designed to serve an aggregation of land physically suitable for irrigation and proximate to a water supply which can be applied to it by the construction of feasible carriage and distribution facilities. Essentially it is land which is the subject of an irrigation project and not the people who own it from time to time.

While it is undoubtedly true that so-called Indian irrigation projects were originally conceived and authorized primarily for the benefit of Indians, it has always been recognized that non-Indian land might be included within them. It was well known by Congress at the turn of the century when it began to address comprehensively the objective of applying water to lands in the arid West, and to authorize so-called Indian irrigation projects, among other reclamation projects, that a considerable amount of irrigable land within Indian reservations which would be included in such projects had already passed out of Indian ownership.

In sum, although intended primarily for the benefit of Indian-owned land, it always has been contemplated that land owned by non-Indians would be included in and benefited by so-called Indian irrigation projects. Not only has Congress authorized and appropriated funds for such projects with full understanding of this, it also has made provisions to adjust,

defer and cancel reimbursable charges assessed against land within such projects owned by non-Indians similar to those it has made for Indian lands. Compare: 25 U.S.C. 389–389e with 25 U.S.C. 386a.

As a practical matter, an irrigation project must be administered with regard to the entirety of the land included therein, regardless of the personal status from time to time of the several owners thereof. Ultimately the practice of the kind of discrimination against non-Indian owners for which California Rural Legal Assistance contends, would detriment the Indian owners of land within a project by diminishing its market value. A prospective non-Indian purchaser of such land would discount its value to accommodate the fact that it would receive less favored treatment under the project in his hands.

Legally there is no substance to the suggestion that Federal funds appropriated by Congress to the Bureau of Indian Affairs for the construction, repair and improvement of irrigation systems cannot be used to benefit land owned by non-Indians included within irrigation projects administered by that Bureau. We assume that the funds available for expenditure on the Pala project are rather limited. We, of course, express no opinion as to whether the construction plans formulated by the Bureau for the project represent a judicious assignment of priorities for the employment of those funds.

RICHMOND F. ALLAN,
Deputy Solicitor.

Copy to:
Secretary Anderson
Mr. Officer, Asst. to Secretary.

APPENDIX B

STATUTES INVOLVED

The relevant provision of 28 U.S.C. 1331 provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. (Supp. V) 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The pertinent provision of the Act of November 2, 1921, 42 Stat. 208, 25 U.S.C. 13, provides:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> * * * * *
>
> For extension, improvement, operation, and maintenance, of existing Indian irrigation systems and for development of water supplies.

Section 1 of the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U.S.C. 345, provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

The Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. 386a, provides:

> The Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way

as shall be equitable and just in consideration of all the circumstances under which such charges were made: *Provided*, That the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred; and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished, and any construction assessments heretofore levied against such lands in accordance with the provisions of section 386 of this title, and uncollected, are hereby canceled: *Provided further*, That a report shall be made to Congress annually, on the first Monday in December, showing adjustments so made during the preceding fiscal year: *Provided further*, That any proceedings hereunder shall not be effective until approved by Congress unless Congress shall have failed to act favorably or unfavorably thereon by concurrent resolution within sixty legislative days after the filing of said report, in which case they shall become effective at the termination of the said sixty legislative days.

Section 1 of the Act of June 22, 1936, 49 Stat. 1803, 25 U.S.C. 389, provides:

The Secretary of the Interior is authorized and directed to cause an investigation to be made to determine whether the owners of non-Indian lands under Indian irrigation projects and under projects where the United States has purchased water rights for Indians are unable to pay irrigation charges, including construction, maintenance, and operating charges, because of inability to operate such lands profitably by reason of lack of fertility of the soil, inadequacy of water supply, defects of irrigation works, or for any other causes. Where the Secretary finds that said landowners are unable to make payment due to the existence of such causes, he may adjust, defer, or cancel

such charges, in whole or in part, as the facts and conditions warrant. In adjusting or deferring any such charges the Secretary may enter into contracts with said landowners for the payment of past due charges, but such contracts shall not extend the payment of such charges over a period in excess of ten years.

The relevant provision of the Act of July 7, 1964, Pub. L. 88–356, 78 Stat. 273–275, provides:

TITLE I—DEPARTMENT OF THE INTERIOR PUBLIC LAND MANAGEMENT

* * * * *

BUREAU OF INDIAN AFFAIRS

* * * * *

CONSTRUCTION

For construction, major repair, and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services by contract; $52,009,000, to remain available until expended: *Provided*, That no part of the sum herein appropriated shall be used for the acquisition of land within the States of Arizona, California, Colorado, New Mexico, South Dakota, Utah, and Wyoming outside of the boundaries of existing Indian reservations: *Provided further*, That no part of this appropriation shall be used for the acquisition of land or water rights within the States of Nevada, Oregon, and Washington either inside or outside the boundaries of existing reservations: *Provided further*, That such amounts as may be available for the construction of the Navajo Indian Irrigation Project may be transferred to the Bureau of Reclamation.

The relevant provision of the Act of June 28, 1965, Pub. L. 89–52, 79 Stat. 174–176, provides:

TITLE I—DEPARTMENT OF THE INTERIOR, PUBLIC LAND MANAGEMENT

* * * * *

BUREAU OF INDIAN AFFAIRS

* * * * *

CONSTRUCTION

For construction, major repair, and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services by contract: $34,513,000, to remain available until expended: *Provided*, That no part of the sum herein appropriated shall be used for the acquisition of land within the States of Arizona, California, Colorado, New Mexico, South Dakota, and Utah outside of the boundaries of existing Indian reservations except lands authorized by law to be acquired for the Navajo Indian Irrigation Project: *Provided further*, That no part of this appropriation shall be used for the acquisition of land or water rights within the States of Nevada, Oregon, and Washington either inside or outside the boundaries of existing reservations: *Provided further*, That such amounts as may be available for the construction of the Navajo Indian Irrigation Project may be transferred to the Bureau of Reclamation: *Provided further*, That not to exceed $558,000 shall be for assistance to the Dunseith, North Dakota, Public School District No. 1, for construction of an addition to the Dunseith Public School.

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The respondents, in their opposing brief in No. 665, do not respond to any of the points raised by the petitioners with respect to sovereign immunity and the Administrative Procedure Act. They prefer instead to argue that petitioners' contentions were "neither presented to, nor passed on by, either court below," thereby presumably impugning the ripeness of this question. Factually, respondents are manifestly mistaken. The Administrative Procedure Act has been before the

courts from the inception of this litigation.[1] Moreover, the history of this litigation and its treatment by both courts below illustrates the critical need for this Court to lay down guidelines for the lower courts in handling A.P.A. cases.

Paragraph 20 of the Amended Complaint alleges, inter alia, that the action is "for judicial review of agency action pursuant to 5 U.S.C. Chapter 7." The Sixth and Ninth Claims charge that the challenged agency action is "arbitrary, capricious and constitutes an abuse of discretion." Title 5 U.S.C. §§ 702, 705 and 706 were cited in the Memorandum of Points and Authorities filed with the Complaint. The government defendants brought a Motion to Dismiss in which they argued, inter alia, that the suit was barred by sovereign immunity. In their Points and Authorities in Opposition to the government's Motion to Dismiss, the Indian plaintiffs specifically argued

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[1]Of course, this Court may consider issues of law that are raised for the first time. Kiefer-Stewart Co. v. Seagram, 340 U.S. 211 (1951) at 214. Since the sovereign immunity question at issue here was expressly considered and passed on recently by the Ninth Circuit in State of Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969), and has been passed on by other courts of appeal and is now clearly at the heart of the present controversy, the government's contention borders on the frivolous.

that "sovereign immunity is waived by the Administrative Procedure Act," and cited Mulry v. Driver, 366 F.2d 544 (9th Cir. 1966); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959); and Homovich v. Chapman, 191 F.2d 761 (D.C. 1951).

The district court elected to treat the government's Motion to Dismiss for failure to state a claim as a motion for summary judgment as permitted by Rule 12 of the Federal Rules of Civil Procedure. Scholder v. United States, 298 F.Supp. 1282 (S.D. Cal. 1969), at 1285, Pet. App. C 4. Although the district court therefore purported to reach "the merits" of the controversy, and referred in its opinion to plaintiffs' allegation that the challenged agency action constitutes an abuse of discretion, 298 F.Supp. at 1286, Pet. App. C 7, careful examination of the court's opinion discloses that its decision was founded on the alleged failure of Congress to express by relevant statute a specific intention not to benefit non-Indians. See especially 298 F.Supp. at 1287, Pet. App. C 9. Thus, the court did not distinguish between the plaintiffs' position respecting the interpretation of the appropriation statutes and plaintiffs' arguments that the challenged agency action in the circumstances presented by the case at bar is arbitrary and capricious and constitutes an abuse of discretion. No mention was made of the government's sovereign immunity contention.

Sovereign immunity and the Administrative Procedure Act did not play a prominent role at the appellate level for two reasons. First, although the issue was raised and argued in the district court, it was not discussed in the opinion. Second, the Ninth Circuit had recently gone out of its way in dicta in State of Washington v. Udall, supra, to reject the view that the Act constituted a limited waiver of sovereign immunity. However, plaintiffs did carefully distinguish between their statutory interpretation and abuse of discretion claims.

The opinion of the court of appeals, like that of the district court, refers to plaintiffs' contention that the challenged agency action constitutes an abuse of discretion, but also fails to meet this issue on the merits. In the case of the court of appeals, this failure is clearly ascribable to its holding that "sovereign immunity shields the decision [of the Bureau of Indian Affairs] from judicial scrutiny," Pet. App. B 11, and its reliance on State of Washington v. Udall, supra, at the critical juncture. Pet. App. B 5, Thus, the issue that is squarely presented to this Court is whether, as a matter of law, sovereign immunity is a bar to the abuse of discretion claim. The question could not be more ripe.

As illustrated by both opinions below, a court's approach to the issue of sovereign immunity will determine its treatment of the merits. If, in order to reach the merits, a court is convinced

it must find either an ultra vires or unconstitutional action, it will tend to look for a specific statutory or constitutional prohibition. Tooahnippah v. Hickel, 397 U.S. 598 (1970), discussed in Part I of the Reasons for Granting the Writ in the Petition, exemplifies the opposite and more appropriate inquiry. There, this Court refrained from abstract statutory interpretation in favor of assessing the challenged agency action in light of the circumstances presented by the case and the limits on agency discretion to be implied from relevant statutes and policies. This Court should exercise its plenary jurisdiction not only to resolve the conflict among the courts of appeal on the sovereign immunity question, but also to lay down authoritative guidelines for the proper handling of the merits of A.P.A. cases.

The record and posture of this litigation manufactured in the Brief for the Respondents in Opposition bears no relationship to the actual history of this case. In light of the inability of the government to face the issues presented in the Petition without grossly distorting the record, the need for review of the action below is indisputable.

Dated: October 29, 1970

Respectfully submitted,

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